84-1713

Office-Supreme Court, U.S.
FILED
APR 30 1985
ALEXANDER L. STEVAS,
CLERK

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LEONA BRENNER,
Petitioner

V.

UNIVERSAL-RESILITE COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTION PRESENTED

1. Was the Court of Appeals empowered to order a new trial because it perceived that there had been a "compromise verdict" by the jury, but refuse even to address the trial judge's finding that there was no such "compromise"--would not assay making the mandated holding that there had somehow been an "abuse of discretion"?

LIST OF PARTIES

The President and Fellows of Harvard College was a Respondent party in the lower court, but is not a party to this Petition.

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Petitioner, Leona Brenner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on January 30, 1985.

OPINIONS BELOW

None of the opinions below are reported, but all are set out in full in the "separately presented" Appendix hereto, in accordance with Rule 21 .1(k).

JURISDICTION

While couched as a denial of petitioner's motion to recall mandate, the court of appeals Memorandum And Order entered on January 30, 1985, is the effective "decree sought to be reviewed" hereby, both substantively and determinative of the timely filing of this petition. (In an Order entered on March 19, 1985, (A. 2) the lower court specified that its January 30th Memorandum And Order, denying the recall of mandate, had "in effect" denied petitioner's then pending petition for rehearing.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This diversity personal injury case (jurisdiction in the district court per 28 U.S.C. §1332) was tried to a jury in March, 1983, in the United States District Court for the District of Massachusetts, and its verdict returned on several special questions on several counts against several defendants. On July 21, 1983, ruling on plaintiff's motion for a new trial, the trial judge entered judgment against Universal Resilite Company (hereinafter "Resilite") for breach of warranty, in accordance with the jury's answer to one special question, but ordered a partial new trial limited to the issue of damages because the amount of damages found was patently inadequate. On December 20, 1983, the trial judge denied Resilite's motion for reconsideration, which had asked for an entire new trial because (as here relevant),

it was argued, there was a suggestion there there had been a "compromise verdict." The parties waived their rights to a jury trial on the amount of damages leaving them to the trial judge to determine, and on April 24, 1984, he rendered a judgment against Resilite in the amount of $175,000, plus interest.

Resilite duly appealed to the United States Court of Appeals for the First Circuit, and on November 18, 1984, that court entered a 20-page slip opinion ordering an entire new trial, holding that the trial judge erred as a matter of law in entering judgment against Resilite for breach of implied warranty. In a three sentence concurrence, Senior Circuit Judge Aldrich noted that he did "not share the court's feelings on the subject of jury compromise" (the majority having detailed why the inadequate damages did not

demonstrate "a compromise on liability"). That opinion began the curious litany of Court of Appeals decisions resulting in this petition.

The plaintiff then duly filed a petition for partial rehearing, which demonstrated that several dispositive "oversights" by the court--legal and factual--rendered invalid both of its grounds for holding Resilite's liability was not established and a new trial required. (A. 34) / On January 11, 1985, in a Per Curiam Memorandum And Order, the court's "previous opinion [was] withdrawn from publication", and the panel, rather obliquely, discarded both of its previous reasons for a new trial but "the majority judges...adopt[ed] concurring Judge Aldrich's alternative ground for ordering the new trial": that there had been a "compromise verdict." The plaintiff duly

filed a second petition for partial rehearing explaining that this "newly relied-upon" justification for a new trial was, demonstrably, as invalid as were the previous two reasons (A. 8). The plaintiff pointed out that the court had "overlooked" the trial court finding that there had not been a "compromise verdict", and the partial new trial on damages therefore an appropriate procedure; reminded the panel that the applicable standard of review mandated, therefore, a holding that the trial judge "abused his discretion" in order to reverse the judgment; and that it was impossible to hold there had been such an abuse in this case. Plaintiff asked that the panel at least permit the parties to brief further this new ground for reversal.[1] Three days

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[1] This "compromise verdict" theory was Resilite's sixth and last argument in its brief, set out on two and a half pages, and, perceiving it as no more than an insubstantial "throwaway" argument, the plaintiff's response was only a page long.

after receiving the petition the panel denied the petition in its 12-line January 30, 1985, Memorandum And Order, which is the subject of this petition,[2] and refused even to address the trial court's finding that there was no "compromise verdict" or how it could be ignored.

The plaintiff then petitioned for rehearing en banc, arguing that it was lawless for the court to refuse to comply with the applicable standard of review, to insist upon totally ignoring the trial judge's dispositive finding that there had been no "compromise verdict." (The First Circuit had never before reversed a judgment entered after a partial new trial on damages only, and doing so in this way in this case was

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[2] One must assume that somehow, over the three days the panel took to deny plaintiff's petition, it reached Senior Circuit Judge Skelton, of the Federal Circuit (sitting on the panel by designation), in Washington, but collegiality was, perforce, brief.

contrary to every previous decision.) On February 27, 1985, rehearing en banc was denied.

On March 19, 1985, this Court handed down its decision in Anderson v. City of Bessemer City, North Carolina, ___U.S.___, 53 L.Wk. 4314 (1985), and while not directly in point, it seemingly rendered the instant error a fortiori; petitioner, therefore, moved again that the lower court recall its mandate, comply with the teachings of that case and conform with the appellate process demanded, and obviate this petition. On April 10, 1985, the motion to recall mandate was, however, denied.

REASONS FOR THE ALLOWANCE OF THE WRIT

The clear error here presented warrants the exercise of the Court's power of supervision. This aberration of federal appellate review should not be let pass. The lower court's bold refusal to

comply with the unquestionably applicable standard of review conflicts with every applicable opinion of this Court, with every other Circuit's precedents, and with all of the First Circuit's own decisions. Correction of this appellate willfulness cannot but spawn broad didactic benefits, and it can easily be accomplished by summary reversal and remand.

In the leading case in this area, Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1931), the Court held that "where the requirement of a jury trial has been satisfied by a verdict according to law upon one issue of fact, that requirement does not compel a new trial of that issue even though another and separable issue must be tried again." Id. at 499.[3]

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[3]The issues of liability and damages on the counterclaim there in issue were too "interwoven" to be resolved separately without confusion and uncertainty, but the Court established the rule, and did separate and let stand the verdict for the plaintiff on the contract sued upon without a new trial.

Here, after the matter was thoroughly briefed and argued, the trial judge carefully specified the separate independent basis for the jury's liability finding against Resilite, and that its damages award was "grossly inadequate", so a partial new trial limited to the damages issue was "mandated" to avoid "a miscarriage of justice (A. 113) It is well-established, in all the Circuits, to use the First's own formulation, that a "motion for a new trial on the grounds of inadequate or excessive damages is addressed to the discretion of the trial cour and its decision may be reversed only for an abuse of that discretion",[4] and such a revers rarely occurs.[5] The First Circuit itself has

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[4] Stafford v. Perini Corp., 475 F.2d 507 at 512 (1st Cir. 1973), citing Boston & Maine Railroad v. Talbert, 360 F.2d 286 (1st Cir. 1966), and New York, N. H. & H. R. Co. v. Zermani, 200 F. 2d 240 (1st Cir. 1952), cert. denied, 345 U.S. 917 (1953).

[5] See 6A Moore's Federal Practice, §59.08[6] at 59-168 and 59-178, and cases therein collected.

said: "It's in an extreme and unusual case that an appellate court would be justified in concluding that the trial judge committed an abuse of discretion"[6]--that it must be demonstrated that there was "manifest abuse of discretion."[7] In the closely analogous situation of "the denial of a new trial, upon a remittitur of part of the verdict", this Court established "abuse of discretion" as the standard of review.[8] The trial court's finding was brought to its finer instant focus when it subsequently denied, after briefing by the parties, Resilite's motion

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[6] Peterman v. Indian Motorcycle Co., 216 F.2d 289 at 291 (1st Cir. 1954).

[7] Ganapolsky v. Park Gardens Development Corp., 439 F.2d 844 at 846 (1st Cir. 1971).

[8] Neese v. Southern Railway Company, 350 U.S. 77 (1955).

for reconsideration, which specified the argument that there had been a "compromise verdict", that the damages issue was too "interwoven" to permit a partial new trial thereon. A trial court finding that there was no "compromise verdict" is also reviewed under an "abuse of discretion" standard: "appellate courts ask whether the trial court abused its discretion", and "uphold an order of a new trial on damages only unless the record clearly demonstrate[s] a compromise judgment." (Emphasis supplied)[9] Courts have recognized that the "abuse of discretion" appellate standard of review, here specifically applicable, is, for all intents and purposes, the same as the

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[9] Nat. R. R. Passenger Corp. v. Koch Industries, Inc., 701 F.2d 108, 111 (10th Cir. 1983), citing Luria Brothers & Co. v. Pielet Brothers Scrap Iron & Metal, Inc., 600 F.2d 103, 115 (7th Cir. 1979) and Maher v. Isthmian Steamship Co., 253 F.2d 414, 419 (2d Cir. 1958).

"clearly erroneous" appellate standard--that the two formulations only differ semantically, not in fact.[10] Only last month, this Court unanimously re-emphasized in Anderson v. City of Bessemer City, North Carolina, ___U.S. ___, 53 L.Wk. 4314, No. 83-1623, March 19, 1985, "the obligation of a court of appeals to accept a district court's findings unless clearly erroneous," Id. at 4317, and delineated the scope of that standard of review, the mandated deference which must be accorded trial court findings. The Court reversed the Court of Appeals holding that the trial court's findings were "clearly erroneous", and while the particular evidentiary focus of the opinion makes it sui generis, the clear "message" is that federal Courts of Appeal

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10 See, Nat. R. R. Passenger Corp. v. Koch Industries, Inc., 701 F.2d 108, 111 (10th Cir. 1983); Crowther v. Seaborg, 415 F.2d 437, 439 (10th Cir. 1969).

" 'must constantly have in mind that their function is not to decide factual issues de novo'" Id. at 4317 (quoting from Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 [1969]). Implicit, of course, in Anderson and its progenitors, is that Courts of Appeal must apply, vel non, the appellate standard of review, be it "clearly erroneous" or "abuse of discretion", before they can reverse a district court finding. Whether the appellate court utilizes the review standard correctly or not, it must in good faith utilize it, at the very least. Here, the lower court's error is particularly egregious, because the court willfully refused to accord the petitioner the process unarguably due. The court said there had, somehow, been a "compromise verdict", without even taking recognition of the fact that the district court had found to the contrary,

much less assaying an explanation of why this was one of those "extreme and unusual case[s]" in which "the trial judge committed an abuse of discretion." Be clear: "willfully refused" is not an excess of rhetoric, it is quite true (strange and sad as it is to report). After petitioner's first petition for rehearing demonstrated that the lower court's first two reasons for a new trial were totally invalid, the court withdrew that 20-page opinion, and selected the "compromise verdict" rationale. Petitioner then specified to the court that it had overlooked the trial court's contrary finding, and that it therefore had to demonstrate an "abuse of discretion" not to affirm the judgment. The fact that the original majority of the court had spent a page specifying why there had <u>not</u> been a "compromise verdict" (A. 79-80) was also, of course, alluded to, as dispositive proof

that it could not be held that there was an "abuse of discretion." That elicited only the lower court's apparent pique, and a denial of a rehearing on this "newly relied-upon" (and hardly briefed) issue, without even a reference to the trial judge's findin or how it constituted an "abuse of discretio (A. 6) Rather clearly, the court could not elucidate an "abuse of discretion" so it determined that it would not. That is law by fiat, and this Court cannot let that pass. "...[T]his Court's power of supervision" (Rule 17) is nothing if it is not exercised, and here the error is as clear as the facts and the applicable law.[11]

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[11]The lower court's "rush to judgment" may also have been infected with a misplacement of the burden of persuasion. The Memorandum And Order refusing to address the trial court's finding that there was no "compromise verdict", notes that "the court is not persuaded" by petitioner's argument (A. 6). It was, of course, Resilite's burden to demonstrate "an abuse of discretion", and that issue was not even briefed.

As noted initially herein, summary reversal is here appropriate, and that boon to judicial economy would not be at the expense of the substantive issue involved. The facts are not in issue and the applicable law is as clear and well-established as the error--full briefing and oral argument would serve no purpose.[12] The Court has many times utilized summary disposition in such cases.[13] The instant record also warrants the remand order directing an affirmance of the district

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[12] Because the error is so clear, it may be wise to disabuse the Court from a passing speculation that "there must be something more to this than appears"--that maybe petitioner was a drug dealer, or somehow unworthy of compensation in some broad sense of justice. That is not the case; petitioner is a young doctor, totally deserving of compensation for her serious injuries (A. 97). Nothing lurks de hors the record.

[13] See, for examples with instant relevance, Trout v. Lehman, ___U.S. 104 S.Ct. 1404 (1984), and Neese v. Southern Railway Company, 350 U.S. 77 (1955).

court judgment, not just the obvious direction to the court below that it determine if there were an "abuse of discretion." It is impossible to hold that there was an "abuse of discretion" in this case, so the ultimate question of the necessity to affirm the trial court judgment should also be determined.[14] Where the record supports a factual conclusion either way (the most that can here be said in support of the lower court's new trial decision), the strict appellate standard cannot be held satisfied--when a trial court opts for one of two permissible views, it cannot be an "abuse of discretion"[15] It

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[14]Doing so would obviate the possibility of the lower court's perhaps utilizing a pro forma recitation that there was an "abuse of discretion", an avoidance which this Court has recognized as insufficient compliance with the standard of review. See Pullman-Standard v. Swint, 456 U.S. 273, 291-293 (1982).

[15]United States v. Yellow Cab Co., 338 U.S. 338 (1949); See, United States v. National Association of Real Estate Boards, 339 U.S. 485, 495-496 (1950).

is here unarguably established that the trial judge's finding that there was no "compromise verdict" was such a "permissible view":

1. The trial judge explicated why the jury's aberrational damages verdict was not interrelated with its liability decision (A. 113)--

2. a conclusion "...particularly [valid] in personal injury cases where the issue of damages is independent from that relating to liability...."[16]

3. In the lower court's initial opinion (now "withdrawn") the majority clearly recognized the soundness of the jury's verdict on Resilite's liability: "...clear, consistent and supported by the evidence." (A. 77)

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[16] Yates v. Dann, 11 F.R.D. 386 at 392-394 (Del. 1951).

4. The majority of the court delineated in its first opinion exactly why there was no jury "compromise" (A. 79-80).[17]

5. After petitioner detailed to the lower court that it must demonstrate how there was an "abuse of discretion" in order to reverse and require a retrial, all that the court could manage was that "something was awry"! Such a weak and fuzzy characterization by itsself demonstrates that the court could not meet the standard of review mandated, not just proof it would not.

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[17]The court's subsequent memorandum permits of only two possible explanations of the aberrational damages verdict, both reflecting compromise (A. 31), but it conveniently ignores its own third non-compromise alternative set out in its earlier opinion (and there are other equally valid speculations)--"compromise" cannot be said to be "clearly demonstrated", as it must be to reverse. That original opinion, contrary to the lower court's ultimate decision, may have been "withdrawn", but the court's own prior logic does not thereby disappear.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue and at the same time the Court should summarily reverse the judgment of the United States Court of Appeals for the First Circuit and order the district court judgment affirmed, or, at the very least, remand with instructions that the lower court comply with the mandated standard of appellate review and decide if there was an "abuse of discretion."

Respectfully submitted,

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